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SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term, 1964

No. 655

Bernard Simon, et al.,

Petitioners,

—against—

Carvel Corporation, Carvel Dari-Freeze System, Inc., Carvel System Benefit Corporation, Eagle Cuba Corporation, H. P. Hood & Sons,

Respondents.

And Eight Other Cases.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS IN OPPOSITION

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September, 1964.

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OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—against—

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOO[illegible] SONS,

Respondents:

And Eight Other Cases.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS IN OPPOSITION

This brief is submitted by the Carvel respondents[1] in opposition to the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered on May 8, 1964.

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[1] Respondents Carvel Corporation, Carvel Dari-Freeze Stores, Inc., Carvel Stores Realty Corporation, Carvel Stores of New York, Inc., Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc. and Carvehicle Corp. are referred to herein as "the Carvel respondents" or sometimes simply as "Carvel."

Statement of the Case

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (made and entered May 8, 1964), affirming judgment of the District Court dismissing, after trial, their claims for treble damages for violation of the antitrust laws. The opinions of the Court of Appeals are reported in 332 F. 2d 505; the trial court's opinion is found in 206 F. Supp. 636.[2] The last sentence of the trial court's opinion reads (A60): "This opinion shall constitute the findings of fact and conclusions of law of the Court."

A. *Prior Proceedings*

Petitioners' complaints invoked jurisdiction on the ground of diversity of citizenship claiming damages for fraudulent inducement to enter into franchise agreements, and also asserted independent claims under the antitrust laws based on the alleged illegality of respondents' franchise agreements and conduct pursuant thereto. The cases were referred for all purposes to (the late) District Judge Archie O. Dawson, who, on consent of all parties, tried the cases without jury. Pursuant to orders of consolidation and severance for purposes of trial, the fraud claims were tried first and were all dismissed on the basis of an opinion containing elaborate findings of fact.[3] Petitioners did not appeal from dismissal of their claims based on alleged misrepresentations.

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[2] Hereinafter references to the opinions below will be to pages of the appendix to the petition A-1 to A-29 (Court of Appeals), and A-30 to A-60 (District Court).

[3] The opinion dismissing the fraud claims is not officially reported.

Thereafter, Judge Dawson conducted the trial without jury on the issue of liability on the antitrust claims. Pursuant to a pretrial order which embodied the consent of all parties (A31) "both sides relied primarily on documentary evidence to establish their case" (A32), plaintiffs (petitioners here), having agreed ". . . that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws" (A22; also Carvel Defendants-Appellees Appendix, p. 15c).[4] Except for price fixing provisions of an earlier and superseded franchise agreement, to which four of the petitioners were parties, which were held invalid (A3, A55),[5] Judge Dawson directed entry of judgment dismissing the complaints against all the defendants in his opinion of June 7, 1962. His opinion incorporated findings of fact that plaintiffs had failed to prove any of the violations of the antitrust laws upon which their claims were predicated.

On appeal by petitioners, the Court of Appeals held that the trial court's findings were based on substantial evidence in the record and its conclusions were free of error; set forth independent and concurrent findings and conclusions that appellants (petitioners here) failed to establish any violation of antitrust laws, and affirmed the judgment below. There were two opinions in the Court of

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[4] Further references to this appendix will be identified as "Carvel App."

[5] The invalid pricing provisions were contained in the franchise agreements executed by *Susser*, *McCoy* and *Mueller* in 1954 and by *Frederick* in 1953 (A55 fn. 13). The other plaintiffs, petitioners here, were parties to what the opinions refer to as the "post-1955" franchise or revised franchise agreements and with respect to such petitioners, the unanimous finding of the Court of Appeals (A5-7) confirmed the finding of the trial court (A53-55) that their franchise agreements did not contain unlawful price fixing provisions and that respondents did not otherwise attempt to impose illegal price maintenance.

Appeals, one by Chief Judge Lumbard, writing for the majority in part, and dissenting in part (A2-A22), and the other by Circuit Judge Friendly, writing for a majority of the Court consisting of himself and Circuit Judge Medina (A22-A29).

The affirmance was by a unanimous court in all respects except one. The exception was the subject of the partial dissent by the Chief Judge whose views on the alleged illegal tying arrangements were subjected to specific and documented analysis in the separate opinion of the majority of the court (A23-A29), which concurred with the holding of the trial court that petitioners had failed to sustain their claim of tying arrangements in violation of the Clayton Act. The reasoning of the dissent is as follows:

1. That respondents' dominance or sufficient economic power over a "tying" product, ". . . may be presumed from the use of the Carvel trademark as the principal feature of the Carvel franchise system" (A12, A13);

2. That the franchised dealers' obligation to purchase Carvel special formula mix and other ingredients going into the end product made to Carvel specifications, from respondents or sources which they designate, would satisfy the second requirement of an illegal tying arrangement, if the commerce in such "tied" commodities was not insubstantial unless it was proven that such restrictions are necessary for the protection of Carvel's goodwill (A16, A10); and by this route the dissenting judge reaches his point of dissent, namely:

3. That it would be best to relieve petitioners of their stipulation[6] embodied in the pretrial order and "to remand the cause to the district court for a further hearing limited to the issue of justification" (A18), inasmuch as he considered the evidence on the subject of justification, particularly the testimony of Vettel, "to be unsatisfactory and inconclusive" (A16).

A summary of the findings and reasoning on which the majority opinion rejects the view expressed in dissent are:

a. A remand was neither required nor warranted on the claim respecting the "tied" purchases of flavoring, toppings and cones ". . . in the light of the pretrial order to which plaintiffs agreed" (A22);

b. Respondents did not have sufficient economic power with respect to a "tying" product to appreciably restrain competition in the market for the "tied" product, because the evidence in the record showed (i) that in the areas of greatest activity, New York, Connecticut and Massachusetts, the 250 Carvel dealers therein comprised one-fifth of one percent of the outlets where ice cream cones could be purchased and were apparently doing about one percent of the business in this tri-state market (A23); (ii) that

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[6] The relevant portion of the pretrial order quoted in the majority opinion (A22) reads (italics supplied):

"4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.

"5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier defendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."

the Carvel dealers competed with the franchised dealers selling similar products under other brand names as well as with chains and independents selling such products from mobile units, other chain stores such as Howard Johnson, and "with the ubiquitous corner drugstore"; (iii) that a common-sense view of the evidence indicates the "insubstantiality" of the commerce affected in the sales of the "tied" products (A24);

c. While a trademark may conceivably acquire such prominence that the required purchase of other items, conditioned upon its license, would satisfy the market dominance test invoked by the relevant cases defining illegal tying arrangements, this is not such a case because: "The figures show that Carvel is not such a mark" (A25);

d. Dominance or economic power cannot be presumed from the licensing by Carvel of a package of trademarks, design patents of a building, and a patented freezing and dispensing machine because "the focus" [or "tying" element] of the franchising system consists neither of the patented nor of the copyrighted items which are "without motivating significance in bringing about the agreement", but rather the Carvel trademark which the evidence failed to show had acquired sufficient prominence to satisfy the requirement of market dominance (A25):

e. The majority opinion points out that: (i) *Standard Oil Co.* v. *United States*, 337 U. S. 293, 306 (1949) identifies an exceptional situation where the use of tying arrangements would have economic justification for the protection of goodwill namely, ". . . where specifications for a substitute would be so detailed that they could not practicably be supplied" (A26); (ii) respondents' restrictions and practices presented such a situation because of "the problem of controlling something so insusceptible of precise verbal-

zation as the desired texture and taste of an ice cream cone or sundae" (*id.*); (iii) testimony on the point (by Vettel) that it was ". . . impracticable to handle the problem by specification and policing was sufficiently reasonable and persuasive that the [trial] judge was entitled to credit it" (A27); and (iv) decisions of this Court dealing with tying arrangements do not support the dissenting opinion (A23-29);

f. In the context of such evaluation of the facts and the law bearing upon the economic justification for Carvel to protect its goodwill and trademarks, under the special circumstances that were inherent in their use by 400 dealers making and selling ice cream products under the Carvel name, the majority opinion of the Court of Appeals concluded that (A26):

> "The record affords no sufficient basis for upsetting the finding of the District Judge that 'To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation . . .'"

To avoid repetition, we will describe in the course of the argument section of this brief, the grounds for dismissal of further claims of antitrust violations (other than tying arrangements), with respect to which a unanimous Court of Appeals concurred in the findings and conclusions of the trial court.

We will close our statement of the case with a brief summary of the nature of the business transactions involved.

B. *The Carvel Franchise System*

Petitioners became licensees to make and sell at retail ice cream products under the Carvel name in stores of uniform and distinctive appearance and design by agreeing to the terms of a franchise agreement and other instruments which were executed upon the initiation of the relationship. All such dealers used the same freezer-dispenser with a Carvel patented tip which created in the finished product a swirl design associated with the Carvel trademark. Other identifying signs, insignia, display and lighting devices featured the name Carvel.

A manual which supplemented and was part of the franchise agreement instructed the dealers in all phases of the operation of the store, and the preparation and service of the ice cream products (A3-4; A33-35). The trial court found that the uniformity of stores, operation and quality of the product of which the public took notice served to attract "the business to the Carvel operators". "The name Carvel constitutes a trademark of great value to the defendant [Carvel respondents] companies and to the franchised operators" (A36). The Court of Appeals agreed (A20).

At the time of trial, Carvel had 400 dealers, whose peak purchases from Carvel aggregated approximately $5,000,000 (A4). The dealers in Carvel's relatively small chain (A17) compete with numerous independent and chain-store vendors of ice cream products and the franchised dealers of similar organizations such as "Dairy Queen", "Tastee Freez", "Dari-Delite", "King Kone", "Dari-Isle" as Judge Friendly points out in the majority opinion below (A24). While respondents' total sales "are not insubstantial," the Court holds that the record reveals the "insubstantiality" of the commerce in all accessory products, excluding sales of mix (*id.*). The Carvel mix is treated in all

opinions below as a secret formula mix (A8, A21; A24; A34). It is respondents' main product and accounts for two-thirds of the sales of all ingredients (A24, fn. 2). The concurrent findings in all opinions below establish that the purchase of Carvel mix is properly linked to the use of the Carvel trademark (A20-21; A24-25; A46). Accordingly, the Court below concluded that not only was the amount of commerce in the accessory items not consequential, but also that the dealers' small annual outlay for such accessories makes plain that any possible damage to petitioners "was even less so" (A24), namely, trivial (A29).

Respondents do not manufacture or process ice cream mix or other ingredients. They purchase them under agreements with suppliers to whom the Carvel secret formulae and specifications are given under strictly worded provisions to assure secrecy and quality control. These articles necessary for the preparation and sale of products under the Carvel name are resold by respondents to their own dealers and to no one else, and are, indeed, delivered directly by Carvel suppliers to the dealers for the account of Carvel in fulfillment of purchase orders. The dairies (respondents Hood and Rakestraw) agree to "deliver only Carvel mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind" (A38). Similar agreements and practices are used for respondents' purchase and resale to dealers of cones and other accessory materials made to Carvel specifications (A39).

The dealer agrees in his franchise agreement to buy from Carvel " . . . his entire requirements of Carvel frozen dairy product mix, toppings, flavorings, and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser . . . " and Carvel assumes the obligation " . . . to sell to the dealer the dealer's requirements of supplies set forth in this para-

graph . . . " (¶ 6; see Carvel App. 89c-90c; A42). The stated purpose for this mutual obligation is " . . . to safeguard the integrity of Carvel's trademarks" (*id.*). With respect to items that are not made part of the end product sold to the public (such as machinery, equipment and commissary goods), it is provided that the dealer may, but need not purchase any of them from Carvel, specifying that (¶ 9 of the Franchise Agreement; see A42): "The dealer's obligation under this paragraph is satisfied so long as the dealer equips his store and keeps it maintained in accordance with the specifications contained in the manual."

With relation to the prices to be charged by the franchised dealer, the 1955 revision of the franchise agreement provides that the dealer may sell the authorized ice cream products under the Carvel name "at any price that the dealer determines", and that any recommendation as to price "is in no manner binding upon the dealer" (¶ 8, Carvel App. 91c; A53).

This freedom of the dealer to determine for himself the prices to be charged, applied not only to those who signed the revised franchise agreement, but by circulars, letters and changes in the manual, was likewise made applicable to the dealers who had entered into the June, 1955 form of franchise agreement. They made clear that any reference by respondents to retail prices "are deemed to be references to recommended prices only" and that the dealer was "entirely at liberty to vary these prices if you so desire, and we disclaim any intention to control your retail prices" (A54).

It is in the context of the contract provisions and practices here summarized that respondents conducted their business as reflected in the trial of this case with resultant concurrent findings by both courts below, that respondents did not thereby violate the antitrust laws.

ARGUMENT

I.

Respondents did not by agreement or course of conduct engage in illegal price fixing.

The courts below relied upon franchise provisions which explicitly reserve to the individual dealer to set whatever retail prices he desired, supplemented by bulletins and letters "that Carvel had changed its prior pricing policy, and that each dealer now had the right to set his own price, although Carvel did indicate that its suggested retail prices were based upon its own broad experience in customer sales" (A7). Recommendations as to prices are not illegal unless there is a showing of an attempt to enforce a price structure upon vendees. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588 (1925).

The trial court specifically found that such an attempt to impose a binding price structure was not shown (A55). In the light of a preponderance of evidence that dealers were free to select their own prices, it was not error for the trial court to disregard some isolated communications of a different import. A unanimous Court of Appeals concluded that there was "much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price fixing scheme" (A7).

Denison Mattress Factory v. *Spring-Air Company*, 308 F 2d 403 (5th Cir. 1962) in a closely similar situation affirmed the trial court's finding "that there was no price fixing in this case" (*id.* at 412). *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) was cited and applied.

The petition presents no ground for review of this question.

II.

Respondents' agreements and dealings with dairies, other processors and suppliers are not illegal.

Petitioners assert error in the dismissal of their claim predicated upon respondents' agreements with the dairies that they would "deliver only Carvel mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind" (A38). The Trial Court found that petitioners were not relying on any conspiracy between Carvel and the supplier-defendants or among the supplier-defendants. "No evidence of any such conspiracy was offered" (A37).

Petitioners' brief relies on the effect of such contracts which was to obligate the supplier to refrain from dealing with the franchisee, both in selling the special Carvel mix as well as any non-Carvel mix or other ice cream preparation (Pet. 5-6). The Court of Appeals made findings sustaining those of the District Court on both branches of the contention. With respect to the Carvel special formula mix, it said:

> "... It seems perfectly clear that as the possessor of a secret formula for its ice cream mix, Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix" (A21).

With respect to the suppliers' undertaking to refrain from selling non-Carvel products to the individual dealers, the finding was that:

> "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when affected by non-competing enterprises, is not illegal" (A22).

This view is supported by the authorities. See, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied,* 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam,* 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U. S. 823 (1957).

A unanimous Court of Appeals further found that:

> "The plaintiffs failed to prove that they were foreclosed from alternate sources of supply, or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused" (A22; see the corresponding finding in the District Court at A40).

Accordingly, the petition for review on this aspect of the case is without merit.

III.

Respondents' requirement that their dealers sell only Carvel products under the Carvel trademark, name and label was, on substantial evidence, held to be reasonable and necessary to protect respondents' goodwill.

The Court of Appeals was unanimous in affirming dismissal of this claim by application of the criteria set forth in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1963). It was petitioners' burden to prove the anti-competitive effects of the exclusive dealing arrangement as required by *Tampa* and, said the Court of Appeals (A19):

> "*We find it plain that the appellants have failed to bear this burden.* Instead of introducing evidence to establish the economic effects of the Carvel franchise structure, they merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of

Tampa Electric does not permit adherence to such a stringent standard of legality" (emphasis supplied).

The Court of Appeals relied on an independent ground for affirming dismissal of this claim, namely, the existence of economic justification for respondents' exclusive dealing provisions. This justification was derived from the necessity, propriety and desirability of protecting valuable trademarks which were "the cornerstone of a franchise system" (A20). Said the Court of Appeals (*id.*):

> "The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner."

On the same reasoning, respondents justifiably refused to allow their dealers to sell unauthorized products such as Christmas trees or hamburgers (*id.*), more particularly, as the District Court pointed out, since respondents cannot be considered a competitor in these other non-ice-cream products, a consideration which renders Section 3 of the Clayton Act inapplicable (A49).

For examples of the area of permissive conduct by an owner of a trademark under a licensing agreement, see *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 484 (Ct. of Cust. and Pat. App. 1948); *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953);

Morse-Starrett Prod. Co. v. *Steccone*, 86 F. Supp. 796 (N. D. Calif. 1949).

For other examples holding exclusive dealing provisions reasonable and not in violation of the antitrust laws in analogous situations, see *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2nd Cir. 1953), *cert. denied*, 345 U. S. 994. *Denison Mattress Factory* v. *Spring-Air Company, supra; Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2nd Cir. 1942); cf., *Arthur Murray Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953).

Petitioners' oblique intimations that respondents' franchise business is tainted with predatory intent to violate the antitrust laws (Pet. 9) are quite synthetic. The courts below made specific findings to the opposite effect. With respect to a franchise system generally, the District Court pointed out that it provides the public with an opportunity to get a uniform product at numerous points of sale "from small independent contractors rather than from employees of a vast chain" (A35). "The franchise system of operation is therefore good for the economy" (*id.*). Respondents in the operation of their franchise system were properly concerned with restricting the sale of ice cream products under the Carvel trademark in stores of distinctive design identified with the Carvel name because (A49):

> "Any defects in quality over which Carvel would have no control would detract from the Carvel name and goodwill."[7]

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[7] The majority opinion of the Court of Appeals included the exposure to risk from use of unauthorized products as a ground for justifying Carvel "to insist on products in which it has complete confidence" (A27-28).

Under these circumstances, and because of the perishable nature of the food products involved, the trial court found that (A50):

> "The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields."

The like finding by the Court of Appeals on this subject included reference to the interest of the public:

> "It is in the public interest that products sold under one particular trademark should be subject to the goodwill of a trademark owner" (A20).

Obviously, then, the opinions below and the record do not present the question as the petition puts it (Pet. 3): "Whether trademark protection justifies proscribed tying and exclusive dealing contracts." This is illustrated by *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598-9 (1951):

> "Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name '*Timken*' and *provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not.* A trademark cannot be legally used as a device for Sherman Act violation" (emphasis supplied).

It has been well pointed out in the Report of the Attorney General's Committee to Study the Antitrust Laws (1955, p. 87):

> "The Timken case, therefore, does not cast any cloud upon restrictions in trademark licenses as such. This Committee believes that as in the case of patents, valid trademark rights may provide a lawful main purpose

to which reasonable restriction on competition may be properly ancillary and therefore legal. We also believe that unpatented inventions, know-how, or other trade secret information may give rise to a lawful purpose to which some restrictions on competition may be reasonably ancillary."

It is manifest, we submit, that all reason for granting review of the concurrent findings by the courts below upholding the exclusive dealing features of respondents' franchise system, is wholly absent.

IV.

The "tying" features of respondents' franchise system are justifiably related to the protection of Carvel's goodwill and trademark.

We have already summarized the findings and reasoning on which the majority opinion in the Court of Appeals rejects the views expressed in the partial dissent which is entirely limited to question whether there was justification for respondents' use of the tying arrangements involved in this case. See *supra*, pp. 4-7. The dissent would have preferred a remand to the District Court for further hearing limited to the issue of justification of the tying arrangements in order to protect licensor's goodwill.

A. *Petitioners' contentions.*

The petition recites the existence of the partial dissent as the first reason for granting review. Actually it places no reliance upon the reasoning and conclusion of the dissenting opinion (Pet. 7-9). Petitioners continue to rely solely on *per se* violations (*id.* 5); they argue that *Northern Pacific Ry. Co.* v. *U. S.*, 356 U. S. 1 (1958) assimilated tying arrangements without qualification into the category

of *per se* violation (Pet. 8). They ignored the subsequent statement in *The White Motor Co.* v. *United States*, 372 U. S. 253 at 262 (1963) that: "Tying arrangements or agreements . . . may fall in that category, though not necessarily so."

Petitioners take the further position that (at p. 9): "The protection of goodwill as a justification for tying arrangements has been firmly rejected." In so doing, they ignore what was said in *Standard Stations*, 337 U. S. 293 at 306:

> "The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."

Petitioners urge that the protection of the Carvel name could be validly accomplished through publication of specifications of standards for the different products used (Pet. 9). Their position is broad enough to include publicized specification of the formulae for the special Carvel mix and essential ingredients going into the final product. This would inevitably destroy the Carvel secret formulae and would cause irreparable harm not only to the business of respondents but to the businesses of several hundred Carvel dealers.

Petitioners assign no reason for this position which brushes aside the limited scope of the dissenting opinion, and at the same time, treats as a nullity the affirmance by a majority of the Court of Appeals of the District Court's findings on the evidence.

B. *Substantial evidence supports the findings that the tying arrangements involved in this case are not illegal under Northern Pacific, supra.*

The record here, as the majority opinion below finds, "showed neither that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' nor that 'a not insubstantial amount of commerce is affected'" (A23). In other words, neither element in the definition of illegal tying agreements set forth in *Northern Pacific, supra,* was proven in this case.

The related findings based on an analysis of the statistical evidence of respondents' market position has already been summarized (*supra,* pp. 5-6). The courts below found that there was no proof of sufficient economic power over a tying product; that the commerce affected was insubstantial (A24), and the potential harm to petitioners, trivial (A29). The Court of Appeals also considered that the authorities did not authorize a presumption of dominance when the licensing of a trademark is a relevant part of the tying arrangement under scrutiny (A25), or for that matter, even if the use of patented parts and design patents are a relevant part of the tying arrangement (see A27-28 and the authorities there cited and discussed). Under the circumstances of this case, the latter point is academic because (A25):

> "In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement."

We submit that no basis for review has been shown in this regard, and that this case seems to fall exactly within the language of the exception stated in *Northern Pacific, supra,* 356 U. S. 1 at 6-7:

"Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

C. ***Even had the elements of an orthodox tying arrangement been proven, there is no reason for granting review on this petition because the concurrent findings by both courts of economic justification are not shown to be erroneous.***

The evidence in this case falls within the exception stated in *Standard Stations, supra,* 337 U. S. 293, 306, as pointed out above (*infra,* p. 6). See also *Dehydrating Process Co.* v. *A. O. Smith Corp.,* 292 F. 2d 653 (1st Cir.), *cert. denied,* 368 U. S. 931 (1961); *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd per curiam,* 365 U. S. 567 (1961).

The Court of Appeals found that the District Court was entitled to give credit to the evidence (not contradicted in the record), that it was "impractical to handle the problem by specification and policing . . ." (A27). The problem referred to was one ". . . of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae" (A26). It was reasonable and necessary for Carvel to furnish specifications to its own source of supply "whose product it regularly checked" rather than rely on policing four hundred dealers. The exposure to risk involved in releasing specifications was another reason for validating Carvel's procedure for selecting the suppliers in whose compliance with Carvel formulae and specifications it would have complete confidence. Accordingly, it was the conclusion of the Court that there

was no basis for upsetting the finding of the District Judge that Carvel should not be compelled to advance specifications of its standards for all the various type of accessory products because such action "will impose an impractical and unreasonable burden of formulation" (A26).

CONCLUSION

None of the reasons assigned by the petition for granting the writ (Pet. 7) are of the character indicated by Rule 19 of this Court. Our analysis of the questions presented demonstrates that the petition fails to show substantial error in the concurrent findings of fact and conclusions of law of the courts below. Failure of the petition to reveal special and important reasons for granting review by writ of certiorari requires its denial.

We respectfully submit that the petition herein should be denied.

Respectfully submitted.

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